United Nations

AT

Administrative Tribunal

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# ADMINISTRATIVE TRIBUNAL

Judgement No. 943

Case No. 1031: YUNG

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Victor Yenyi Olungu; Ms. Marsha A. Echols;

Whereas, on 27 July 1998, Wan-Fai F. Yung, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application containing pleas which read, in part, as follows:

"...

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules; and

(d) *To order* the Respondent to produce the relevant minutes of the Appointment and Placement Committee's deliberations concerning the posts for which she had been found eligible as well as any other documentation deemed pertinent.

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To reject* the findings of the Joint Appeals Board that the Applicant's allegations of prejudice had not been proven and that it could therefore not substitute its judgement for that of UNICEF with respect to the Applicant's status;

(b) *To find and rule* that the Respondent's actions in abolishing the Applicant's post of Assistant Project Officer, Research, and threatening her with termination were contrary to prior obligations entered into with the Applicant and violated the requirements of good faith and fair dealing;

(c) *To find and rule* that the decisions of the Respondent to abolish the Applicant's posts on two successive occasions and not to place the Applicant in a permanent post commensurate with her background and abilities were improperly motivated, procedurally flawed and fell short of the requirement of full and fair consideration;

(d) *To rescind* the Respondent's decision to endorse UNICEF's intention to terminate her appointment contingent on her non-selection for a particular P-3 post;

(e) *To find and rule* as a matter of law and equity that the Applicant is entitled to have the issue of her assignment overseas take into account her medical condition and family obligations and dealt with through the appropriate channels;

(f) *To order* that the Applicant be immediately reinstated in the event she is separated from service as a result of the Respondent's decision, or alternatively, if she is still in service, that she be afforded full and fair consideration at the earliest opportunity for placement in a permanent, core P-2 or higher level post;

(g) *To award* the Applicant compensation as an exceptional measure in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(h) *To award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursement."

Whereas the Respondent filed his answer on 14 June 1999;

Whereas the Applicant filed written observations on 3 September 1999, and on 18 October 1999, the Respondent provided his comments thereon;

Whereas, on 27 October 1999, the Respondent submitted additional comments;

Whereas, on 3 November 1999, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 22 December 1975. She was initially offered a three-month fixed-term appointment as a Secretary at the G-3 level in the Administration Division. During the course of her employment she was granted a probationary appointment on 22 March 1976 and a permanent appointment on 1 December 1977. On 1 January 1978, she was promoted to the G-4 level, and on 8 December 1978 she was transferred to the Information Division, with the functional title of Project Support Communications (P.C.) Assistant. She was promoted to the G-5 level on 1 September 1979, and to the P-1 level on 1 January 1981, when she became an Assistant P.C. Officer. On 1 September 1985, the Applicant was promoted to the P-2 level, and on 5 September 1985, she was transferred to the Programme Division and her functional title was changed to Assistant Programme Officer. On 1 January 1994, she was transferred to the Division of Public Affairs (DPA) with the functional title of Assistant Administrative Officer, and on 9 June 1997, to the Division of Communication (DOC), as Assistant Project Officer, Research. The Applicant has been on extended sick leave since 7 April 1998.

In 1996, UNICEF underwent a major restructuring exercise, requiring abolition of a number of posts to achieve overall budget reductions. On 1 November 1996, the Director, DPA, wrote to the Applicant, advising her that "in accordance with the procedures and policies applicable to UNICEF staff encumbering posts to be abolished ... the Budget Planning and Review Committee (BPRC) [had] recommended that the post ... which [she]

encumbered be abolished." Anticipating that the recommendation of the BPRC would be accepted by the UNICEF Executive Board in January 1997, she would be separated on 30 April 1997, unless she had been placed in another position by that time. He assured the Applicant that the decision to abolish her post was based on "various organizational needs and was never a reflection of [her] performance" and encouraged her to apply for posts for which she met the required qualifications. He also informed her that the Recruitment Section of the Division of Human Resources (DHR) would "try its best to identify any suitable vacancies commensurate with [her] qualifications and experience".

Subsequently, the Applicant applied for seven posts. She was short-listed for the L-2 post of Assistant Executive Officer in the Office of the Executive Director, but she was ultimately unsuccessful in her application.

On 25 March 1997, the Applicant requested review of the decision not to select her for the post of Assistant Executive Officer, and that "action be stayed on [her] separation from the Organization until [her] case [had] been subjected to review".

In a memorandum dated 21 January 1997, Ms. Sudershan Narula, Senior Medical Officer, Medical Services Division, United Nations, wrote to Ms. Mieko Tarui, Personnel Officer, DHR, in reference to the Applicant's recent medical examination, on 19 December 1996. She stated that the Applicant suffered from a chronic medical condition, that she had received treatments since 1984, and that, although she could receive comparable treatment in some other duty station, she did not "appear to be psychologically prepared to leave New York". Referring to the fact that the Applicant was also dealing with medical problems within her family, the Senior Medical Officer sought the support of the Personnel Services Section, DHR, in "helping her find another suitable position in New York". She rated the Applicant's medical classification as "1B".

On 21 April 1997, the Deputy Director, DHR, informed several of her colleagues in the Division that the Director, DOC, had agreed that the Applicant be appointed "by Executive Decision" to "a 2-level post in the Division, with mostly administrative (rather than

research) tasks", requiring a revision of the job description. This was the post created in DOC, upon abolition of the Applicant's post in DPA. The Deputy Director, DHR, requested that "[the Applicant's] notice period be extended by one month up to the end of May 1997 to allow for the appointment process to be followed".

On 4 June 1997, the Director, DHR, informed the Applicant that the Executive Director had "approved [her] appointment to the post of Assistant Project Officer, Research, [DOC] ... New York, at [her] current level and maintaining [her] contractual status in this project funded post". The Applicant's appointment took effect on 9 June 1997. Shortly thereafter, the Applicant withdrew her appeal.

On 31 July 1997, the Deputy Director, DHR, wrote to the Applicant, *inter alia*, as follows:

> " ...
>
> As you are aware, given the present restrictive financial situation, all divisions in New York have been requested to realize further cuts in their budget submissions. ... Accordingly, on 30 July 1997, ... [the] Director, DOC, advised you that, further to discussions with your supervisor and his meeting with you on 18 July 1997 regarding the status of your post, the Programme and Budget Review (PRB) Committee had recommended the abolishment of the post you encumber, effective 31 December 1997.
>
> ... we wish to inform you that a special placement review for international professional staff in abolished posts is expected to be convened in the last quarter of 1997. The objective of this exercise is to place as many qualified staff members as possible in posts for which their skills and experience are suitable. Your inability to be posted outside New York for medical reasons will be brought to the attention of the Special Placement Review ..."

On 30 September 1997, the Applicant wrote to the Executive Director, UNICEF, requesting administrative review of the decision to abolish her post.

On 6 October 1997, the Deputy Director, DHR, informed several colleagues in the Division that the Medical Services Division had confirmed that they would clear the

Applicant for a post in Geneva. According to the Medical Services Division, there was no reason why the Applicant should not learn to trust doctors in Geneva.

On 7 October 1997, the Director, DOC, wrote to the Applicant, enclosing a copy of the final version of Chapter 18 of the UNICEF Personnel Manual containing the procedures for the placement of staff encumbering abolished posts. A letter of 6 October 1997, also enclosed, explained that there had been further revisions to Chapter 18 since the version previously sent to Applicant, and as such, the 6 October letter replaced the 30 July letter as formal notice of the abolition of the Applicant's post. The letter also advised the Applicant that "the Programme and Budget Review (PBR) Committee [had] endorsed the recommendation for the abolition of the post [she] encumber[ed] with effect from close of business (...) on 30 April 1998" and that the Executive Director anticipated that the recommendation would be accepted by the UNICEF Executive Board.

On 14 October 1997, in reply to a request for medical clearance, the Medical Services Division informed the Personnel Services Section, DHR, that the Applicant's medical classification was still rated as "1B" and that "medical clearance [was] not required for reassignment to Geneva".

On 4 November 1997, Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, (hereafter the Deputy Executive Director) replied to the Applicant's letter of 30 September 1997, advising her, *inter alia*, that the "the filing of any request for administrative review at this point would be premature as no action has been taken to terminate [her] appointment".

By letter of 18 November 1997, the Director, DHR, informed the Applicant of her "transfer to the post of Assistant Administrative Officer (L-2) ... Geneva", at her "current level and step, maintaining [her] core status", pending approval of the UNICEF Executive Board in January 1998 of the 1998/1999 support budget.

On 30 November 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB) contesting the abolition of her post.

On 5 December 1997, the Applicant wrote to the Executive Director, UNICEF, requesting an administrative review of the above decision, and a stay of action. On 8 January 1998, the Deputy Executive Director, replied to the Applicant's letter of 5 December 1997, on behalf of the Executive Director, UNICEF.

The JAB adopted its report on the Applicant's request for suspension of action on the Respondent's administrative decision on 30 January 1998. It concluded that:

> "16. ... since the Representative of the Secretary-General had confirmed that the decision to transfer Appellant to Geneva required the latter's assent, the question of suspension of action was moot.
>
> 17. As for the decision to terminate Appellant's appointment, the Panel agreed that there would be sufficient grounds to justify a recommendation for suspension of action. However, the Panel agreed it [would] make every effort to complete its consideration of the appeal as expeditiously as possible. ...
>
> ..."

In a letter dated 30 January 1998, the Deputy Executive Director informed the Applicant that the Geneva post of Assistant Administrative Officer (L-2) had been endorsed by the UNICEF Executive Board and requested her to reply to this offer within a week of receipt. The Applicant was advised that if she decided not to accept the offer, it would be rescinded. In that case, however, the Administration would, on an exceptional basis, continue to identify, and put her forward as a candidate for, any suitable posts at her level that would become vacant between that date and 30 April 1998. On the same date, the Director, DOC, sent the Applicant a letter informing her that if she did not accept the Geneva post, and if no other post could be identified for her before 30 April 1998, regrettably UNICEF would have to proceed with her separation of service.

On 5 February 1998, the Under-Secretary-General for Administration and Management informed the Applicant that:

"...

[The Secretary-General] has taken note of the Panel's conclusion that, since your consent to the decision to transfer you to Geneva is required, the question of suspension of action in respect of this issue is moot. He has also taken note that, although the Panel found that there would be sufficient grounds to justify a recommendation for suspension of action regarding the decision to terminate your appointment, it agreed instead that every effort would be made to complete the consideration of the substance of your appeal as expeditiously as possible. The Secretary-General has taken note that the Panel made no recommendation in support of your request and, accordingly, he has decided not to grant your request for suspension of action.

..."

On 6 February 1998, the Applicant replied to the Deputy Executive Director's letter of 30 January 1998, stating that owing to her documented medical condition, she could not accept the transfer to the post in Geneva. In her reply of 12 February 1998, the Deputy Executive Director restated the information provided in her earlier letter of 30 January 1998 and reminded the Applicant that "as an international staff member, [she was] subject to rotation". On 24 February 1998, the Applicant again informed the Deputy Executive Director that she was unable to accept the offer of the Geneva post. On April 7 1998, the Applicant was placed on sick leave for an indefinite period.

On 21 April 1998, the JAB adopted its report on the merits of the case. Its consideration and recommendations read as follows:

"*Consideration*

...

23. Although the Panel was not prepared to accept that Appellant was the victim of some kind of conspiracy, it was equally unwilling to accept that everything possible had been done to ensure that she had received full, as well as fair, consideration. Respondent had argued that in filling all of the posts for which Appellant had been considered proper procedures had been followed, and the

appropriate review body had been consulted. The Panel was aware that, in the absence of a finding of prejudice or improper motivation, it was not called upon to substitute its own judgement for that of UNICEF. ...

24. The Panel was troubled by the fact that the question of Appellant's health - and therefore, her mobility - remained unresolved, and that the Panel itself was incompetent to resolve it. It was also struck by the repeated assertions of both Counsel and Respondent concerning Appellant's qualities as a staff member, qualities confirmed and attested to in her Official Status file. In arriving at its recommendations, the Panel was less moved by compassion for Appellant, though it felt that a staff member with her record and seniority is worthy of it, but more by a sense that UNICEF - and the international civil service - can ill afford to lose staff members of her quality.

*Recommendations*

25. The Panel unanimously recommends that Appellant's date of termination be delayed until the process of selection of incumbents of the P-3 post and the three L-2 posts mentioned by Respondent (...) has been completed. Should she be chosen for one of them, she would continue to serve on her permanent appointment.

26. The Panel also unanimously recommends that should Appellant be chosen for the afore-mentioned L-2 post in Geneva, a Medical Board should be convened to resolve the question of Appellant's medical status.

27. Given the decision of the Secretary-General with respect to a suspension of action, and the short time remaining between the date of this report and 30 April 1998, the Panel most respectfully requests that the Secretary-General expedite the process of decision in this case.

..."

On 4 May 1998, the Under-Secretary-General for Management informed the Applicant that:

"...

In regard to the merits of your appeal, the Secretary-General has taken note of the Panel's finding that you had not provided proof of prejudice or improper

motivation on the part of UNICEF, and that, in the absence of such proof, the Panel was not called upon to substitute its own judgement for that of UNICEF. The Secretary-General has further noted that, irrespective of this finding, the Panel has recommended (i) that your termination date be delayed pending consideration of your candidacy for specified posts at UNICEF New York and Geneva and (ii) that, should you be chosen for the mentioned L-2 post in Geneva, a Medical Board be convened to resolve the question of your medical status.

The Secretary-General has been advised that UNICEF has agreed to delay your termination date until the completion of the selection process for the P-3 post at UNICEF New York for which you have applied. This is in conformity with one of the recommendations of the Panel. Should you not be selected for this specified P-3 post, the Secretary-General has decided that your termination will be effective as of the date of receipt by you of the notification of your non-selection. As you have already turned down an offered post in Geneva, the Secretary-General finds no reason for your termination date to be affected by selection processes for Geneva posts. In regard to all other posts, UNICEF has agreed that you be treated as an internal candidate for any post for which you are now under consideration or for which you apply within one year after the notification of your non-selection referred to above, should this occur.

In respect of the recommendation regarding medical status, the Secretary-General has decided that this issue has already been addressed by the UN Medical Service and that you have been cleared for reassignment to Geneva.

The Secretary-General is aware that the restructuring at UNICEF and its policy of rotation of staff has placed you in a position where difficult choices have to be made. This situation, however, is not uncommon to UNICEF staff.

..."

On 27 July 1998, the Applicant was advised that, since she had rejected the offer of the post in Geneva and since no alternative post had been found for her, the implementation of her separation would be at the expiration of her sick leave.

On the same date, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's permanent appointment violated the United Nations Staff Regulations and Rules.

2. The Respondent's actions regarding the abolition of the Applicant's posts and her proposed transfer to Geneva violated the principles of non-discrimination and due process, and were tainted by prejudice and improper motivation.

3. The Respondent's treatment of the Applicant with respect to her medical condition demonstrated bad faith. The Respondent's failure to respect basic notions of fairness and to follow the proper procedures for addressing medical questions have caused the Applicant needless anxiety and distress.

Whereas the Respondent's principal contentions are:

1. The Applicant's permanent appointment was properly terminated pursuant to staff regulation 9.1 (a).

2. The Respondent has fulfilled his obligation to make good faith efforts to find an alternate post for the Applicant.

3. The decision to abolish Applicant's posts and give her notice of termination was not discriminatory, nor was it vitiated by prejudice or any other extraneous factors.

4. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 8 to 24 November 1999, now pronounces the following judgement:

I. The Applicant seeks various forms of relief, including reinstatement and compensation, based on actions related to a decision to terminate her employment after 20 years of service and after years as a permanent staff member of UNICEF. Two of the

posts held by the Applicant at the P-2 level were abolished. The first post of Assistant Administrative Officer was abolished during the 1996 restructuring of UNICEF, including DPA. Among the Applicant's claims is that she did not receive full and fair consideration for potential new assignments following the abolition of this first post. The second post was slated for abolition in 1997, only six weeks after it was filled by the Applicant. The Applicant claims that this second action violated the principles of good faith and fair dealing. She also claims that the procedures for the abolition of her posts and for obtaining her separation from service were discriminatory.

II. This matter requires the Tribunal to consider the Applicant's rights after the abolition of her posts, the circumstances surrounding her attempts to find new posts as well as the offer and her refusal of a post in Geneva. In resolving these issues, the Tribunal recalls Judgement No. 679, *Fagan*, para. III, (1994), which states that "staff rule 109.1 (c) requires that such efforts [to find a new post] be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation."

III. With regard to the abolition of the first post of Assistant Administrative Officer, the Applicant challenges the events subsequent to that action, rather than the abolition itself. Her complaint is in essence that the Respondent failed to place her in posts for which she was qualified and thereby violated the Staff Regulations and Rules. The Applicant also claims that her original post as Assistant Administrative Officer was used to fund the post of Assistant Research and Evaluation Officer for which she was qualified but not considered.

IV. Chapter 18, paragraph 18.2.20 (a) of the UNICEF Manual concerning "Staff on Abolished Posts" states that when reviewing staff members whose posts are abolished against

available suitable posts, "staff members holding permanent appointments will be retained in preference to those holding fixed term appointments, provided that due regard is given in all cases to relative competence, integrity and length of service". Paragraph 18.2.17 of the UNICEF Manual states that those staff members will automatically be considered for suitable posts, e.g., those in the same occupational group, at the same grade level and for which they are qualified in terms of academic qualifications, job-related skills and work-related experience. Paragraph 18.2.17 (e) (i) states that for international professional staff the post could be located at any duty station.

Staff rule 109.1 (c) (i) also applies. It reads in relevant part "subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those ... on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service."

Thus, both the UNICEF Manual and the United Nations Staff Regulations and Rules attempt to protect permanent staff affected by the abolition of a post but allow the Executive Director and the Secretary-General the discretion to take into account relative competence, integrity and length of service.

V. After receiving the notice of the abolition of her first post, in the absence of a placement by UNICEF and faced with termination, the Applicant applied for seven advertised posts but was not selected. The Applicant claims that she did not receive full and fair consideration for the potential new assignments and claims discrimination in this process.

The circumstances surrounding the selection of the person to fill one of these posts raise serious questions of discrimination and favouritism. The post of Assistant Executive Officer in the Office of the Executive Director was advertised as requiring a university degree (e.g., in public affairs or the social sciences). Fluency in English and either French or Spanish was "required". The text of the notice shows the word "desirable" crossed out and replaced in

handwriting by the word "required" with regard to this language proficiency. Professional experience was requisite. The Applicant has a Bachelor of Arts in Communications, speaks Mandarin and Cantonese and has passed language proficiency examinations in English and French. Moreover, at the time of application, she held an L-2 professional post. However, the person selected to fill the vacancy was not similarly qualified on paper. She did not have a university degree and possessed "limited fluency in French". The Selection Advisory Panel substituted her "relevant experience [as Personal Assistant to the Executive Director who was seeking to fill the post] and consistently good performance" for the educational requirement advertised. Additionally, it converted her from the General Service category to the Professional category, in spite of the vacancy announcement requirement that the successful candidate should be a professional. Finally, the Selection Advisory Panel noted merely that it would be "important" for the career growth of the successful candidate "in the future to attain a university degree ... and that she also be encouraged to continue to improve her French language ability." This was done in spite of UNICEF administrative instruction CF/AI/1986-10 of 26 November 1986, that a person acquire the necessary skills for the proficiency required for a post "within a period of three months".

VI. While the Tribunal does not substitute its judgment for the discretion of the Respondent, he must follow his own rules. By failing to select a candidate who either fulfilled the advertised criteria or could do so within three months UNICEF failed to follow its own rules, including staff rule 109.1, and apparently discriminated against the Applicant.

VII. The Applicant also asserts that her first post was not abolished, but was used to fund another post, at the same level, for which she was denied consideration. The record does not clearly support this assertion. While the job titles for the posts are similar and the timing supports the Applicant's claim, there is also evidence in the record to the contrary.

VIII. Having been unsuccessful in the search for a new post and prior to termination, the Applicant asked the JAB to suspend the termination. Discussions between the parties led to a settlement under which, by executive decision, the Applicant was made Assistant Project Officer (Research) subject to revision of the job description to reflect the fact that the Applicant would have few research responsibilities. According to the Applicant, this was the post funded by the abolition of her previous post. Approximately six weeks later, the Applicant was notified that her new post would be abolished. The Applicant claims that this action violated the principles of good faith and fair dealing and constituted discriminatory procedures.

The Tribunal finds on the record no adequate justification for this action by the Respondent. This is the "belated and uncertain professional relocation" criticized in *Fagan*. In addition, the Tribunal notes that after this second abolition of post, staff rule 109.1 (c) and the relevant provisions of the UNICEF Manual applied again.

IX. In November 1997, after the offer of the second post, the notice of its abolition and her second request for administrative review, the Applicant was offered a post as Assistant Administrative Officer (L-2) in Geneva. The Applicant refused to accept the post. According to the Applicant, in January 1997 the Medical Services Division had urged UNICEF to find a suitable position for her in New York. She claims the Respondent knew that, for medical and family reasons, she would not accept the Geneva post. She claims also that the Respondent's treatment of her medical condition underscores two years of bad faith in undertakings with her and that its failure to respect basic notions of fairness and to follow the proper procedures for addressing medical questions resulted in further anxiety and distress.

The record contains medical evidence of the fragile health situation of the Applicant and her immediate family, although it falls short of showing that the Applicant's health

required her to stay in New York. It would appear that the uncertainty surrounding her employment aggravated her medical condition.

The Tribunal has noted that for international professional staff being considered for a post to replace their abolished post, there are no geographical limitations. Paragraph 18.2.21 of the UNICEF Manual states: "In the event that a suitable post is found, the staff member will be offered that post. If [the staff member] does not accept it, ... the organization will not initiate any further placement action. ... [the staff member] will be separated from service on abolition of post ...".

The Tribunal finds that the post offered was not suitable. Consequently, the refusal by the Applicant was not capricious and was justified under the circumstances.

Whether a post is suitable must be decided on a case by case basis in view of all the circumstances presented. In this matter, the employee had been in service in New York for many years. She was not a young professional but was closer to retirement age. Her family was in New York. Of equal importance is that she had finally found medical care that addressed her health problems. Finally, the Applicant had been passed over for at least one apparently suitable post in New York.

For all the reasons stated above, the Tribunal finds that the Respondent failed to act with good faith, failed to abide by the letter and intent of the relevant provisions of the UNICEF Manual and the United Nations Staff Regulations and Rules regarding permanent staff whose positions have been abolished, and that he discriminated against the Applicant.

X. For these violations the Tribunal orders the Respondent:

(1) To place the Applicant in a suitable post; or

(2) To pay the Applicant compensation of one year of her net base salary on the date of this judgement, if within thirty days of the notification of this judgment the Secretary-General decides, in the interest of the United Nations, not to act under (1) above.

XI. The Tribunal rejects all other pleas, including the request for the production of documents.

(Signatures)

Hubert THIERRY
President

Victor YENYI OLUNGU
Member

Marsha A. ECHOLS
Member

New York, 24 November 1999

Maritza STRUYVENBERG
Executive Secretary